IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.92 OF 2006

Mukund Nagar Satyam Co-op
Housing Society Ltd. ..Appellant.

V/s.

The Maharashtra Housing and
Area Development Authority & Ors. ..Respondents.

Mr.V.R.Tripathi for appellant.

Mr.A.R.Patil, AGP for respondent Nos. 1 to 3.

Mrs.Geeta Joglekar for BMC-respondent No.4.

CORAM: A.M.KHANWILKAR,J

DATE : JUNE 6, 2006.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Patil, AGP waives service for respondent Nos.1 to 3. Mrs. Joglekar waives service for respondent No.4.

4. As short question is involved, appeal is taken up for final hearing forthwith by consent.

5. This appeal takes exception to the Judgment and Order passed by the Trial Court dated December

27, 2005 on Draft Notice of Motion No..../2005 in L.C.Suit No.6220 of 2003. Briefly stated, the appellants filed suit challenging validity of notice issued by the Authority under section 351 of the Bombay Municipal Corporation Act. It is not necessary to advert to all the aspects in the present appeal. Suffice it to observe that the said suit was dismissed on 2nd December, 2005. The appellants took out Notice of Motion for restoration of the suit by setting aside the said order dated 2nd December, 2005. That Notice of Motion has been dismissed by the Trial Court on the reasoning that the only remedy of the appellant is to file separate suit subject to law of limitation and Notice of Motion under Order 9 Rule 8 for setting aside the order of dismissal of the suit is not maintainable. This view taken by the Trial Court, in the Judgment and Order which is impugned in the present appeal, is assailed by the counsel for the appellants on the argument that the Trial Court has misdirected itself in proceeding on the assumption that the notice of motion was referable to the provision of Order 9 Rule 8 of the C.P.Code. This is so because it is common ground that no steps were taken by the appellants to serve the defendants with summons. In such a situation, the suit if dismissed, the order so passed is

referable to the provision of Order 9 Rule 2 of the C.P.Code. If such order is passed, it will be open to the appellants either to file fresh suit subject to law of Limitation or to set aside the order of dismissal of the suit upon satisfying the Trial court that there was sufficient cause for the default committed by the plaintiff, as is contemplated by provisions of Order 9 Rule 4. This submission will have to be accepted. In other words, the order which was passed by the Trial Judge on 2nd December, 2005 is referable to provisions of Order 9 Rule 2, the remedy by way of Notice of Motion for setting aside such order, resorted to by the appellants/plaintiffs, is available as per the provisions of Order 9 Rule 4 of the C.P.Code. Accordingly, it will have to be held that the Notice of Motion as was filed by the appellants was maintainable and ought to have proceeded on merits in accordance with the law. Hence this appeal succeeds. Impugned Judgment and order is set aside. Instead, the Notice of Motion filed by the appellants is restored to the file of the trial Court to be decided on its own merits in accordance with the law. No order as to costs.

6. Parties to appear before the trial Court on 29th June, 2006 at 11 a.m. when the trial Court will

fix appropriate date for hearing of the Notice of Motion.